

the appropriate 180- or 300-day period, but a charge alleging a hostile work environment will not be time-barred if all acts constituting the claim are part of the same unlawful practice and at least one act falls within the filing period; in neither instance is a court precluded from applying equitable doctrines that may toll or limit the time period. **National Railroad Passenger Corporation v. Morgan** (00-1614) 536 U.S. 101 (2002).

The Ninth Circuit, under the continuing violations doctrine, states that if a discriminatory act takes place within the limitations period, and that act is "related and similar to" acts that took place outside the limitations period, all the related acts - - including the earlier acts - - are actionable as part of a continuing violation, which allows plaintiffs to join time-barred Title VII claims. **Fielder v. UAL Corp.**, 218 F.3d 973 (9<sup>th</sup> Cir. 2000), **Anderson v. Reno** 190 F. 3d 930 (9<sup>th</sup> Cir. 1999), and **Draper v. Couer Rochester, Inc.**, 147 F3d 1104 (9<sup>th</sup> Cir. 1998)

The Ninth Circuit recognizes that although there is no statutory exception to the limitations period, the 300-day filing period, like a statute of limitations, may be subject to waiver, estoppel and equitable tolling.

The most widely accepted approach for analyzing the employer's liability for creating a hostile work environment was articulated by in **Faragher v. City of Boca Raton**, 524 U.S. at 807-808 and **Burlington Industries v. Ellerth**, 524 U.S. 742 (1998) Docket (97-569) affirmed. The Supreme Court held that employers are vicariously liable for supervisors who create hostile working conditions for those over whom they have authority. In cases where harassed employees suffer no job related consequences, employers may defend themselves against liability by showing that they

quickly acted to prevent and correct any harassing behavior and that the harassed employee failed to utilize their employer's protection. Such a defense, however, is not available when the alleged harassment culminates in an employment action, such as Ellerth's.

A widely accepted approach for determining proper granting of summary judgment was articulated in **Chuang v. University of California Davis**, No. 9915036 (9<sup>th</sup> Cir., August 30, 2000), which held that to survive summary judgment plaintiff needs to prove that employer's reason for adverse action was pretextual either "indirectly by showing that employer's proffered explanation is unworthy of credence because it is internally inconsistent or otherwise not believable or, directly by showing that unlawful discrimination more likely motivated the employer."

#### **A. Shannon's Employment At State of Arizona Department of Economic Security Rehabilitation Services Administration (RSA)**

Derman Shannon ("Shannon"), an African-American male, began his employment with the State of Arizona Department of Economic Security Rehabilitation Services Administration as a counselor for the Severely Mental Ill (SMI) population in June of 1998 and was promoted to Acting Unit Supervisor in July 1999.

Shannon claims that after he began working with RSA, he was subjected to a pattern of racially discriminatory and retaliatory acts perpetrated by co-workers, supervisors, and managers, specifically Program Managers Barbara Knox and Anna Lira, Program Administrator, Fred Bingham, Assistant Directors Moises Gallegos and Thomas Columbo,

and Directors, John Clayton and David Berns. This conduct continued throughout Shannon's employment with RSA and culminated until he had to discontinue employment on or about November 24, 2003.

During Shannon's employment with RSA, he complained to employer over twenty (20) times of harassment, disparate impact, retaliation, defamation, employer negligence, and fraud, and employer never addressed, responded to and/or resolved issues.

Shannon claims that the first discriminatory act occurred on or about August 14, 1998 when Shannon was falsely accused of sexual harassment. Shannon also continued to complain about racial discrimination to RSA management. Despite Shannon's complaints discrimination and harassment never stopped.

## **B. Proceedings Below**

The district court improperly granted summary judgment in the Defendant's favor on all grounds of discrimination which had been alleged by Shannon. The court held that Shannon failed to first raise these claims with the EEOC concerning a 1999 remark by a supervisor and a December, 2000 decision to extend Shannon's probationary period.

The district court also improperly granted summary judgment in defendant's favor on Shannon's claims regarding his reduction in grade without a pay decrease in 2002. The court held that Shannon failed to raise a genuine issue of material fact as to whether his employer took this disciplinary

measure due to a discriminatory motive rather than due to Shannon's misrepresentation on his job application of the circumstances surrounding his arrest for driving a car containing 200 pounds of marijuana.

The court of appeals affirmed the district courts decision that summary judgment was properly granted on the above stated claims and further held that Shannon's remaining contentions lacked merit. The court relied on 42 U.S.C. Section 2000e-16 (c), *Sommolino v. United States*, 255 F.3d 704, 708 (9th Cir. 2001), *Brown v. Puget Sound Elec. Apprenticeship & Training Trust*, 732 F.2d 726, 730 (9th Cir. 1984), and *Aragon v. Republic Silver State Disposal, Inc.*, to reject Shannon's reliance on the continuing violation doctrine.

## REASONS FOR GRANTING THE WRIT

The petition for writ of certiorari should be granted in this matter as the outcome in this case conflicts with decisions regarding the enforcement of Title VII's limitations period. The Ninth Circuit in Shannon's case erroneously rejected the analysis of the continuing violation doctrine articulated by cases from both the Ninth Circuit and the Supreme Court of the United States. In *UAL v. Fielder*, 69 U.S.L.W. 3619 (U.S. March 7, 2001) (No. 00-1937) seeking review of 218 F.3d 973 (9<sup>th</sup> Cir. 2000). In *Fielder*, the Ninth Circuit held that in hostile environment and sexual harassment cases, a plaintiff may use the continuing violation doctrine to link timely and untimely Title VII claims whenever the "alleged discriminatory acts [which occurred within Title VII's limitations period] are related closely enough to constitute a continuing violation." *Fielder*, 218 F.3d at 987, (quoting *Green v. Los Angeles County Superintendent of Schools*, 883 F.2d 1472, 1480-81 (9<sup>th</sup>

Cir. 1989)). In this case, the Ninth Circuit has gone a step farther—holding that its “related closely enough” or “sufficiently related” test is not limited to cases of hostile environment and sexual harassment but applies to all cases of discrimination. In both this case and in **Fielder**, the Ninth Circuit applied its holding and allowed plaintiffs to recover for an assortment of very different time-barred claims under a continuing violation theory, notwithstanding their failure to file timely administrative charges challenging conduct which they concluded was unlawful ant or shortly after the time it occurred. *Id.*; **Fielder**, 218 F.3d at 989.

This case, like **Fielder**, presents the Court with an opportunity to provide guidance as to what events trigger the running of the limitations period under Title VII and when, if ever, a plaintiff can join untimely claims of alleged discrimination with claims that were the subject of a timely charge.

The petition for writ of certiorari should also be granted in this matter because the Ninth Circuit erroneously rejected the analysis of pretextual adverse action violations articulated by cases from the Ninth Circuit. In **Chuang v. University of California Davis No. 9915036**, the Ninth Circuit held that to survive summary judgment a plaintiff needs to prove that employer’s reason for adverse action was pretextual either “indirectly by showing that employer’s proffered explanation is unworthy of credence because it is internally inconsistent or otherwise not believable or, directly by showing that unlawful discrimination more likely motivated the employer.” Shannon satisfied that which was required by **Chuang**.

The petition for writ of certiorari should be granted in this matter because Shannon produced sufficient evidence of pretext in Title VII discrimination case.

Further review is warranted.

**I. WHETHER THE UNITED STATES COURT OF APPEALS CORRECTLY HELD THAT THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT ON SHANNON'S RACE DISCRIMINATION CLAIMS CONCERNING A 1999 REMARK MADE BY SUPERVISOR AND A DECEMBER, 2000 DECISION TO EXTEND SHANNON'S PROBATIONARY PERIOD, BECAUSE SHANNON FAILED TO RAISE THESE CLAIMS WITH EEOC**

The Ninth Circuit erred by affirming that the district court properly granted summary judgment in Shannon's racial discrimination case that involves ongoing continuing act violations by employer, which subjected him to a hostile work environment. Moreover, the Ninth Circuit's decision expressly conflicts with this Court's rulings that hostile work environment claims are different in kind from discrete acts. Their very nature involves repeated conduct. The 'unlawful employment practice' therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own."

In *National Railroad Passenger Corp. v. Morgan*, 232 F.3d 1008 (2000), the Ninth Circuit reversed the

judgment in its entirety and remanded the case for a new trial on all of Morgan's allegations. In its view Morgan had presented sufficient evidence to create a genuine issue of fact that regarding the existence of a continuing violation of Title VII. Under the "continuing violations" doctrine, it explained, that courts may "consider conduct that would be ordinarily time barred as long as the untimely incidents represent an ongoing unlawful employment practice \* \* \*"

In the Supreme Court's June 2002 decision in **National Railroad Passenger Corp. v. Morgan**, 536 U.S. 101 (2002), it was held that a charge of a hostile work environment claim, however will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period. The court noted, however, that the evidence of each alleged violation significantly overlaps and segregating them is both a difficult and artificial task. Likewise, see **Harris v. Forklift Systems Inc.**, 510 U.S. 17, 21, 114 S.Ct. 367 (1993).

Moreover, the Supreme Court in **Burlington Industries, Inc. v. Ellerth**, 524 U.S. 742 (1998) and **Faragher v. City of Boca Raton**, 524 U.S. 775 (1998), determined how and when employers would be held responsible for workplace harassment caused by supervisors against subordinates. First, employers would be strictly liable for such harassment if it resulted in an adverse job decision, such as firing or demotion \* \* \*. Also, employers would even be strictly liable for harassment not resulting in an adverse job decision, unless the employer proved a two-pronged affirmative defense. The affirmative defense requires that the employer must prove that it had taken reasonable measure to prevent and correct, promptly, workplace harassment \* \* \* behavior, and that the employee

unreasonably failed to take advantage of the protective measures adopted by the employer. The Supreme Court further held that the conduct by Faragher's supervisors and co-workers created a hostile work environment. **Montero v. AGCO Corp.**, 192 F.3d 856 (9<sup>th</sup> Cir. 1999); **Harris v. Forklift Systems, Inc.**, 510 U.S. 17 at 22, 114 Ct. at 371 (1993); and **Steiner v. Showboat Operating Co.**, 25F.3d 1459, 1464 (9<sup>th</sup> Cir. 1994).

In the Ninth Circuit, according to **Fielder v. UAL Corp.**, 218 F.3d 973 (9<sup>th</sup> Cir.2000), a plaintiff can establish a continuing violation in one or two ways. First, a continuing acts violation can be established by showing a series of related acts, one or more of which are within the limitations period - - a serial violation. A serial violation is established if evidence indicates that the alleged acts of discrimination occurring prior to the limitations period are sufficiently related to those occurring within the limitations period. The second way to establish a continuing violation, is to show a systematic policy or practice of discrimination that operated, in part, within the limitations period - - a systemic violation. Systemic violations involve "demonstrating a company wide policy or practice" and most often occur in matters of placement or promotion.

"A 'hostile work environment' occurs when there is a pattern of ongoing and persistent harassment severe enough to alter the conditions of employment." **Draper v. Coeur Rochester, Inc.**, 147 F.3d at 1104, 1108 (citing **Meritor Savings Bank v Vinson** 477 U.S. 57, 66-67 (1986)). As the court noted in **Fielder**, "Most instances of hostile work environments are not capable of facile identification; instead, the day to day harassment is particularly significant, both as a legal and a practical matter, in its cumulative effect." **Fielder**, 218 F.3d at 985 (quoting **Draper**, 147 F. 3d at

1108). Likewise, in **Meritor** it was also held that in general, really severe conduct has been found to create a hostile environment after just one or two occasions.

Moreover, in **Anderson v. Reno**, 190 F.3d at 936-37 (9<sup>th</sup> Cir. 1999), the court applied the continuing violation doctrine where plaintiff filed suit in 1994 after experiencing harassment stretching back to 1986.

In Section 1 of the Fourteenth Amendment of the United States Constitution states that all persons born, or naturalized, in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

The United States Supreme Court has determined in both **Burlington v. Ellerth** and **Faragher v. City of Boca Raton** that an employer would be vicariously liable for creating a hostile work environment if they could not prove that it took reasonable measure to prevent, and correct promptly workplace harassment. The Ninth Circuit's decision conflicts with this Court's precedent and is erroneous. This Court should intervene to correct this decision.

## II. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT CORRECTLY HELD THAT THE DISTRICT COURT PROPERLY GRANTED SUMMARY

**JUDGMENT ON SHANNON'S CLAIMS  
REGARDING HIS REDUCTION IN GRADE  
WITHOUT A PAY DECREASE IN 2002, AND  
WHETHER SHANNON FAILED TO RAISE A  
GENUINE ISSUE OF MATERIAL FACT AS TO  
WHETHER HIS EMPLOYER TOOK THIS  
DISCIPLINARY MEASURE DUE TO  
DISCRIMINATORY MOTIVE RATHER THAN  
DUE TO SHANNON'S MISREPRESENTATION  
ON HIS JOB APPLICATION OF THE  
CIRCUMSTANCES SURROUNDING HIS  
ARREST FOR DRIVING A CAR CONTAINING  
200 POUNDS OF MARIJUANA**

The Ninth Circuit erred by affirming that the district court properly granted summary judgment in Shannon's racial discrimination case involving his retaliatory demotion. To establish a *prima facie* case of retaliation under Title VII, plaintiff must show that he engaged in protected activity, suffered an adverse employment decision, and there was causal link between protected activity and the adverse employment decision. Civil Rights Act of 1964, Section 701 et seq., as amended, 42 AU.S.C.A. Section 2000e et seq. The alleged voluntary grade reduction in 2002, and employer's false allegations that Shannon falsified his 1998 employment application involving the circumstances surrounding his arrest for driving a car containing 200 pounds of marijuana was a precursor to a retaliatory demotion.

Moreover, in *Reeves v. Sanderson Plumbing*, 530 U.S. 133 (2000), in a unanimous opinion delivered by Justice Sandra Day O'Connor, the Supreme Court held that "A plaintiff's *prima facie* case of discrimination combined with sufficient evidence for a reasonable factfinder to object the

employer's nondiscriminatory explanation for its decision, may be adequate to sustain a finding of liability for intentional discrimination." **Steiner v. Showboat Operating Co.**, (9<sup>th</sup> Cir. 1994) and **Folkerson v. Circus Circus Enterprises, Inc.**, 107 F 3d 754 (9<sup>th</sup> Cir. 1997).

In **Chuang v. University of California Davis**, No. 9915036 (9<sup>th</sup> Cir., August 30, 2000), it was determined that to survive summary judgment plaintiff needs to prove that employer's reason for adverse action was pretextual either "indirectly by showing the employer's proffered explanation was unworthy of credence because it is internally inconsistent or otherwise not believable or, directly by showing that unlawfully discrimination more likely motivated the employer."

The Ninth Circuit held in **Ray v. Henderson**, 217 F. 3d 1234 (9<sup>th</sup> Cir., 2000), that an employer retaliates against an employee when it treats the employee in an adverse manner based on retaliatory motive and is reasonably likely to deter the employee from engaging in a protected activity, and that a hostile work environment may be the basis for a retaliation claim under Title VII. See also, EEOC's Compliance Manual on Retaliation adopted by the Ninth Circuit and **Garden v. Lawn**, 805 F.2d 1400, 1405 (9<sup>th</sup> Cir., 1986).

Ninth Circuit held that a 'personnel action' motivated by "retaliatory animus" creates liability under Title VII regardless to whether that action would warrant the award of remedies. **Hashimoto v. Dalton**, 118 F 3d 671, 675 (9<sup>th</sup> Cir., 1997). In **Hashimoto**, the Court held that the Plaintiff had adduced sufficient evidence to give rise to a genuine issue of material fact concerning whether RTC took action against plaintiff in retaliation for his filing an EEOC complaint.

Defendant's motion for summary judgment on this claim was denied.

While it is true that one must threaten "wrongful" action in order to be guilty of duress, the landmark supreme case, on duress, **Kaplan v. Kaplan**, 25 Ill. 2d 181, 186, 182 N.E. 2d 706 (1962), says that the meaning of "wrongful" is "not limited to acts that are criminal, tortious, or in violation of a contractual duty, but extends to acts that are wrongful in a moral sense." **Kaplan**, 25 Ill. 2d at 186. Even though an employee may be terminable at will, it is not impossible for the threat of discharge to constitute duress. **Mitchell v. C.C. Sanitation Co.**, 430 S. W. 2d 933 (Texas Civ. App. 14<sup>th</sup> District 1968).

In 35 Am. Jur. Section 273, **Master And Servant**, it is said, \* \* \* accordingly, in determining the issue as to responsibility for the employee's injury, much importance attaches in the fact that the employer or his representative gave a command, order, or direction to the employee to do the act which resulted in injury to the latter. Where this fact is shown, the issue as to responsibility or negligence is held, ordinarily, to be properly submitted to the jury. It is a fundamental of the relation of master and servant that the servant shall yield obedience to the master, and this obedience an employee properly may accord even on being confronted with perils that otherwise should be avoided \* \*

The Ninth Circuit has explicitly rejected the analyses used by the U.S. Supreme Court in **Reeves v. Sanderson** where the Supreme Court held that a plaintiff after establishing a prima facie case of discrimination combined with sufficient evidence for a reasonable factfinder to object employer's nondiscriminatory explanation for its decision

may be adequate to sustain a finding of liability for intentional discrimination. There is no doubt that under this analysis, a reasonable factfinder would find that the court of appeals erred.

The First Amendment to the United States Constitution of the United States of America protects state employees from patronage dismissals, but also from "even an act of retaliation as trivial as failing to hold a birthday party for a public employee \* \* \* when intended to punish him or her for exercising his or her free speech rights."

For all these reasons, the Ninth Circuit's decision is wrong and conflicts with this Court and its interpretation of the law. Further review is warranted.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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September 2005

## APPENDIX

## UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DERMAN SHANNON

Plaintiff - Appellant,

V.

## ARIZONA DIRECTOR

## ECONOMIC SECURITY,

DEPARTMENT OF; et al.,

**Defendants – Appellees.**

)No. 04 - 16513

)D.C. No. CV.-02-02585-EHC

## JUDGMENT

Appeal from the United States District Court for the District of Arizona (Phoenix). This cause came on to be heard on the Transcript of the Record from The United States District Court for the District of Arizona (Phoenix) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED**.

Filed and entered 06/22/05

JUL 14 2005

**"s/Gabriela NawAll"**

Deputy Clerk

## SUMMARY

The district court affirmed summary judgment in favor of Shannon's employer to time-bar the 1999 derogatory remark by his supervisor and the 2001 extension of probation incident as discrete acts which required a charge to the EEOC within three hundred days of each event. The district court also affirmed summary judgment in favor of Shannon's employer RSA regarding his 2002 demotion and unwarranted transfer which was the subject of a timely charge, because the discipline administered was based on legitimate and non-discriminatory reasons. RSA misrepresented the facts regarding whether Shannon had a felony conviction for drug trafficking. Shannon does not have any felony convictions. Shannon received a Suspended Imposition Sentence in the State of Missouri in 1995. Pursuant to the laws of the State of Missouri, a Suspended Imposition Sentence is not a conviction.

The court of appeals affirmed the district court's summary judgment in favor of Shannon's employer. The court held that when an employer's pre-limitations period discriminatory conduct is part of a series or pattern of discrimination, retaliation, and hostile environment, the continuing violation doctrine applies and the pre-limitations period conduct should be presented to the jury for purposes of liability, but Shannon's contentions lack merit.

Appellant Derman Shannon, an African-American male, applied for a job with Appellee, State of Arizona Department of Economic Security (DES) on October 1996 and was promoted to State of Arizona DES Rehabilitation Services Administration (RSA) on July 1998. From the date of his hire with DES RSA to his having to stop work with

RSA four years later, due to occupational related Major Depression and Anxiety Disorders, Shannon complained over twenty times to employer regarding workplace harassment by supervisors, managers, directors and co-workers. However, employer never responded to, corrected, and/or prevented the harassment.

On September 11, 2002, prior to his demotion and unwarranted transfer, Shannon filed a charge of race discrimination in violation of Title VII of the Civil Rights Act of 1964 against DES RSA with the Equal Employment Opportunity Commission (EEOC) including continuing action. EEOC issued a right to sue letter. On November 1, 2002, after his demotion and unwarranted transfer, Shannon filed a second charge against DES RSA with the Equal Opportunity Commission (EEOC) and received another right to sue letter and Shannon filed suit against DES RSA in federal court, alleging violations of Title VII of the Civil Rights Act including discrimination, retaliation and hostile work environment.

The court also agreed with RSA that Shannon provided no evidence to suggest that he did not voluntarily accept the demotion or unwarranted transfer or that the demotion was involuntary or based on race, gender, or retaliation, even though Shannon complained to internal employment entities (RSA district office, RSA central office, Director of DES), twice to EEOC and received two notice of rights to sue letters, and externally (State of Arizona Ombudsman).

The court of appeals affirmed the district courts decision of granting summary judgment to Shannon's employer, State of Arizona DES RSA, stating that Shannon's contentions lack merit.

## 1) Incidents Prior To the Limitations Period

Shannon applied for job with State of Arizona DES RSA in 1998. Although educated with a Master's Degree in Education and Supervision and experienced in the Human Resource field, Shannon began working as a Human Resource Specialist (rehabilitation counselor).

On August 14, 1998 Shannon was cleared of sexual harassment charge but requested in writing that employer discipline his co-workers, female Karen Holloway and female Nadia who was responsible for false accusations, but employer never responded to Shannon nor corrected issue.

On or about September 16, 1998 Shannon complained to Program Manager Lira in writing about his being subjected to a hostile work environment by co-worker Karen Holloway. Program Manager never responded to nor resolved issue.

On or about October 1, 1998 Program Administrator Fred Bingham counseled Shannon verbally and in writing regarding Karen Holloway's allegation that Shannon made inappropriate statement to a client. Shannon responded to allegations verbally and in writing. Bingham never responded nor resolved issue.

On October 9, 1998, Shannon verbally and in writing requested that Administrator Bingham investigate the facts regarding false allegations by Karen Holloway, by speaking to direct witnesses (client and another counselor) as a means of protecting Shannon's reputation. Bingham never responded nor resolved issue.

On or about November 23, 1998 Shannon complained to Program Manager Barbara Knox in writing, informing her

that several employees made Shannon aware that Karen Holloway made derogatory statements about Shannon in a clinical staff meeting. Program Manager Knox never responded nor resolved issue.

On or about March 1999, Shannon reported verbally and in written of massive agency malfeasance and harm to clients to Program Manager Knox regarding Vendor Reports. Program Manager Knox never responded nor resolved issue.

On or about May 6, 1999 Acting Supervisor Hilda Celaya confronted Shannon directly after office staff meeting and said that Program Manager Knox had just called and stated that Shannon allegedly told someone that he was a 'former pimp.' Shannon immediately contacted Knox in writing requesting that Knox promptly resolve—issue. Program Manager Knox never responded, corrected nor prevented harassment.

On or about November of 1999 Shannon reported to Knox verbally and in writing, details of what appeared to be wasteful expenditures paid to vendor by Karen Holloway totaling tens of thousands of state and federal taxpayers' dollars, but Program Manager Knox never responded, corrected, nor resolved issue.

On April 3, 2000 Shannon confronted RSA Program Manager Anna Lira verbally and Program Manager Linda Shuttleworth in writing regarding Shuttleworth's allegation that Shannon refused to work with a client and provided proof to support. Neither Program Manager neither responded to Shannon's complaint nor corrected issue.

On April 21, 2000, Shannon answered requested questionnaire from DES RSA Central Office Manager and

reported disparate treatment in regard to salary, job responsibilities, experience and education. RSA Manager never responded nor corrected issue.

On or about September 2000 Shannon reported to Knox in writing regarding as much as a \$13,000 contrast in Shannon's salary to other employees who were less educated and had fewer job responsibility and lower level of difficulty. Program Manager Knox never responded nor corrected issue.

On September 7, 2000 Shannon reported salary discrimination in response to a questionnaire sent to all DES employees from Director John Clayton of DES. Director of DES never responded nor resolved issue.

On or about December 19, 2000 Shannon notified Program Managers Knox and Lira regarding insubordination by one of Shannon's subordinates. Neither Knox nor Lira responded to nor resolved issue.

On January 8, 2001, two days prior to Shannon's promotional probation end date, Administrator Bingham wrote correspondence to Assistant Director Gallegos with purpose of getting permission to extend Shannon's probation for allegations of DES policy violations that Bingham knew were impossible for Shannon to violate. Bingham never corrected issue.

On or about January 11, 2001 Shannon emailed program Manager Knox regarding a RSA policy question which directly linked Knox and Bingham to over a decade of misrepresentation of fact and agency malfeasance. Knox never responded to Shannon's request.

On January 11, 2001, a day after Shannon's promotional probation had officially ended, Program Managers Knox and Lira verbally and in writing counseled Shannon and extended Shannon's probation without any entries on Communication Record regarding administrative nor performance difficulties. With over 25 years of DES RSA tenure, Program managers should have known that they violated DES policy but never corrected issue.

On or about January 15, 2001 Shannon complained in a written rebuttal to Knox regarding Knox, Lira and Administrator Bingham's knowledge of facts misrepresented on Shannon's promotional probation evaluation and mentioned of their roles in over a decade of agency malfeasance that was harmful to clients. Program Manager Knox never responded to complaint nor resolved issue.

On January 17, 2001 Shannon complained to Administrator Bingham in writing with cc: Director of DES, about being exposed to continuous harassment by administration which was causing serious medical problems and family problems, and literally begged employer for help. Neither Bingham nor Director of DES responded to Shannon's request for intervention nor corrected issue.

On or about January 19, 2001, Shannon satisfied the Grievance discussion indicating intentional Title VII violations by supervisor, pointing out policy violations that should have been obvious which subjected Plaintiff to emotional distress. Employer never resolved issue.

On or about January 26, 2001, Program Manager Knox forwarded ESTEEM Step I Grievance Response to Shannon that showed direct evidence of retaliation and inference of disapproval of Shannon's requesting a fair salary. Program Manager never responded nor corrected issue.

On or about February 8, 2001, Shannon complained to Knox about his being harassed by office secretary who worked for Knox approximately 30 years. Program Knox never addressed nor corrected issue.

On or about February 15, 2001, 2-3 weeks prior to female subordinate employee's probation end date, Plaintiff Shannon met with Knox and took employee's Communication Record entries that pointing out performance difficulties and requested direction. Knox failed to respond but later notified Shannon and directed Shannon in writing to put employee into permanent status by default. Knox never corrected the issue.

On February 22, 2001 Shannon complained to Knox regarding disparate treatment involving his probation being extended a day after his probation end date, without any entries on Communication Record of performance difficulties in contrast to her directing Shannon to grant female subordinate permanent probation status who had many entries of performance difficulties on her Communication Record. Knox never responded to nor corrected issue.

On or about February 22, 2001 office secretary who worked for Knox approximately 30 years and friends with Bingham and Lira for just as long, filed grievance against Plaintiff Shannon to get her rating of "Meet Expectations" in the area of Customer Service changed to "Exceeds

Expectations," even though female secretary was aware of several employee complaints against her during the assessment period (2/1/00-1/31/01).

On or about February 27, 2001 office social worker who worked for Knox approximately 30 years and friends with Bingham and Lira for just as long, filed a grievance against Plaintiff Shannon, to get her rating of "Meets Expectations" in the area of Customer Service changed to "Exceed Expectations" during the assessment period (2/1/00-1/31/01), even though female social worker had 3 different client complaints in writing during the period.

On March 8, 2001 Shannon was notified in writing by Administrator Bingham that Shannon had lost his grievance to get his assessment rating changed from "Below Expectations" to at least a "Meets Expectations," even though Shannon had absolutely <sup>1</sup>no notification of

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<sup>1</sup> July of 2000 direct evidence in writing showed that Shannon was promoted from Acting Unit Supervisor because of office accomplished to Unit Supervisor.

August of 2000, direct evidence in writing showed that as a supervisor on probation, Shannon's office goals superseded those of seasoned supervisors.

August of 2000, direct evidence in writing showed that Shannon was nominated for "Professional of the Year."

September 2000, direct evidence in writing showed that Shannon was honored at State of Arizona Annual RSA Recognition Ceremony and presented an award.

October 2000, on or about, Shannon facilitated 'Diversity Training' for new RSA candidates by request from employer.

On October 13, 2000 direct evidence in writing showed that Shannon received "Pride of the Spot" award for Teamwork, Integrity,

performance or administrative difficulties during the assessment period, only accolades.

On March 16, 2001 Shannon complained in writing to Assistant Director Moises Gallegos regarding disparate treatment concerning female subordinate employee's being allowed permanent status with entries of indicating performance difficulties on her Communication Record, in contrast to Shannon's probation being extended with no performance difficulties and his being sent to supervisor training, and loss of grievance. Employer never corrected issue.

On or about April 2, 2001 Shannon requested from Personnel an expedited lateral transfer in writing from the supervisor's job due to intolerable working conditions and intentional subjection to emotional distress by employer.

On or about April 2, 2001 Shannon followed up on a training interview with DESRSA training department that had two openings and had neither males nor African-Americans in department. Even though employer had Shannon utilize his expertise as a trainer twice before, RSA

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Quest for Quality, Customer Service, Morale Building and Good Citizenship.

On October 16, 2000 direct evidence in writing and photographs, showed that Shannon was honored on Bosses Day and supervisors and managers from RSA District Office and Central Office attended.

On October 24, 2000 direct evidence in writing from DES RSA Monitor's Report showed that as office unit supervisor Shannon's overall office statistics were good.

hired two white females with less training, same education and less experience. DES never responded.

On or about April 5, 2001 Shannon and Cruz were notified in writing from Bingham that female subordinate Cruz had won her grievance against Plaintiff Shannon and Shannon was instructed to change Cruz's assessment score to "Exceeds Expectations."

On or about April 5, 2001 Shannon and Espinoza was notified in writing from Administrator Bingham that female subordinate Espinoza had won her grievance against Plaintiff Shannon and Shannon was instructed to change Espinoza's assessment to "Exceeds Expectation."

On or about April 25, 2001 employer requested from Arizona Department of Public Safety and received fingerprint report which informed employer that Plaintiff Shannon had no felony convictions on criminal record.

On or about May 31, 2001 employer requested from United States Department of Justice Federal Bureau of Investigation (F.B.I.) Criminal Justice Information Services Division and received fingerprint report which informed employer that Plaintiff Shannon had no felony convictions on criminal record.

On March 16, 2002 Shannon corresponded in writing to Assistant Director Moises Gallegos complaining of intentional racism by DES RSA Administration and stated that the unit supervisor job was of no interest because of intolerable working conditions. Assistant Director Gallegos never responded neither did he prevent nor correct intentional subjection of emotion distress.

## **2) Incidents Within Limitations Period**

On September 5, 2002 Shannon received an official notice of charges of misconduct from DES Assistant Director Thomas Columbo accusing Shannon of falsifying his employment application dated April 15, 1998 and therefore misled the department in regards to his alleged felony conviction of 1994/1995.

On September 11, 2002 Shannon filed a Title VII racial discrimination claim against State of Arizona DES RSA including, hostile work environment, continuing action, disparate treatment of African-American males, and Retaliation. Shannon received a Notice of Right to Sue.

On October 1, 2002 Shannon visited the State of Arizona Ombudsman, and reported myriad State of Arizona Policy violations and Title VII violations, including intentional discrimination by supervisors, administrator, co-workers and Director's Office and left evidence with ombudsman to support allegations. State of Arizona Ombudsman never resolved issue.

On October 9, 2002, Ombudsman who commuted from Nevada to Arizona acknowledged in writing her confirming that Shannon was emotionally distraught due to infliction of emotional distress by supervisors and managers and included her out of state home telephone number to call her stating that Shannon shouldn't try to handle everything or handle it alone.

On October 17, 2002 Shannon was called to a demotion meeting with Bingham and Knox and was threatened with termination if Shannon did not sign letter

requesting a voluntary grade decrease for allegedly falsifying an April 15, 1998 application regarding an alleged felony conviction and agree to an unwarranted transfer on October 18, 2002.

On October 18, 2002 Shannon did not report to new office but instead, went the State of Arizona Ombudsman's Office and made complaint of continuing violations of harassment by supervisors and managers and left documents to support complaints. State of Arizona Ombudsman never corrected nor resolved issue.

On October 30, 2002 Shannon visited Psychologist Ellen Johnston, was diagnosed with work-related depression and Johnston suggested that Shannon be prescribed psychotropic medication.

On November 1, 2002, Shannon filed another EEOC claim for continuing Title VII Violations including subjection to hostile work environment, intentional subjection to emotional distress, retaliation and disparate treatment because of race and gender and received another Notice of Right to Sue.

### **3) Continued Incidents After 2<sup>nd</sup> EEOC Claim Filed and Until Shannon Had to**

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<sup>2</sup> On April 25, 2001 RSA requested and received Shannon's Criminal History Record from Arizona Department of Public Safety which stated that Shannon had no felony convictions.

On May 21, 2001 RSA requested and received Shannon's Criminal History Record from the Federal Bureau of Investigations (FBI) which stated that Shannon had no felony convictions.

**Discontinue      Employment      Due      to  
Occupational-Related Illness**

On February 17, 2003 Shannon reported to supervisor and to Administrator Bingham DES RSA Policy violations by Program Manager involving economic need to supervisor and Administrator Bingham. DES never responded nor corrected issue.

On or about July 25, 2003 Shannon visited Licensed Psychologist and Registered Pharmacist, Will Counts R.Ph.Ph.D., and was diagnosed with Occupational-related Major Depression and Anxiety Disorder Episode and Shannon began immediately taking psychotropic medications.

On August 18, 2003 Shannon went into RSA break room and saw a 4 page racist email posted on the break room wall which demeaned American-Americans, tore the posting off wall and reported derogatory posting to supervisor.

On September 12, 2003 an Order was signed by district court judge ordering Shannon to undergo an independent psychological evaluation, by a psychologist hired by employer, DES RSA.

On October 13, 2003 Shannon underwent a psychological evaluation administered by Al Silberman, Ed.D psychologist of State of Arizona's RSA's choice, and psychologist affirmed that if Shannon had been discriminated against by employer, Shannon certainly had been affected by depression and anxiety as confirmed by two other psychologists. Dr. Silberman suggested, in writing, that

employer further investigate all of Shannon's allegations. Employer never responded nor corrected issue.

On October 29, 2003 Shannon complained to the State of Arizona Director of DES, David Berns, in writing that <sup>3</sup>the majority of African-American male employees

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<sup>3</sup> The total amount of African-American male employees hired by RSA consisted of 11 and 82% of those suffered disparate impact and treatment:

- 1) Willie Williams was ostracized and had active lawsuit in Federal Court when he died in 1999; district court knew that the majority of Williams's fellow employees would testify that that they felt RSA's treatment of Williams contributed to his death.
- 2) Frank Johnson was ostracized, demoted from supervisory position, put on house arrest, and takes psychotropic medication for occupational-related depression and anxiety
- 3) Daniel Adonis was ostracized, forced out of supervisory position and left employment due to occupational related illness due to intolerable work conditions.
- 4) Weldon Saafir was ostracized because of personnel leak shared with all RSA employees in State.
- 5) Elwood Horsey was ostracized, taken out of Master's Program and diagnosed with occupational-related Depression.
- 6) Rick Rios was ostracized and later fired.
- 7) Plaintiff Derman Shannon was ostracized forced out of supervisory position and now receives long-term disability and Social Security due to occupation-related Major Depression and Anxiety Disorder.
- 8) John Monagai was ostracized, suffered from occupational-related depression and left employment due to intolerable working conditions.

(which totaled 11) had been discriminated against, subjected to a hostile work environment, and suggested that the Director speak to all of the African-American employees to confirm racism. Director of DES never responded nor corrected issue.

On or about November 24, 2003 Shannon made attempt to go to work but was not mentally able to drive into the parking lot. Consequently, Shannon had to quit employment and go on occupational-related disability for ongoing intentional subjection of Title VII discrimination initiated by same group of supervisors and managers.

On or about May of 2004 Plaintiff Shannon and two dependents began receiving and continue to receive monthly benefits from Social Security Administration and Shannon receives monthly benefits from Long Term Disability from the State of Arizona for Major Depression and Anxiety Disorder.

#### **4) Overall Environment**

Shannon presented evidence to the district court that he and the majority of his fellow African-American male employees had been subjected to racial discrimination and were willing to testify in a jury trial of being in an extreme

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9) Felix Dean was ostracized, suffered from occupational-related illness for working in intolerable working conditions and later fired.

10) Patrick Young left employment with RSA.

11) Ray Carr remains

racially-laden working atmosphere at RSA. The majority of the African-American male employees were aware that RSA had only hired 2 of the total 11 African-American males from 1972 until 22 years later in 1994. Shannon presented evidence to the district court with dates which showed a systematic pattern of race discrimination against the majority of the African-American males employed by State of Arizona RSA happening simultaneously. Moreover, the majority African-American male employees would testify to a racially offensive work atmosphere under Administrator Bingham's leadership. Specifically: 1) Willie Williams, a supervisor with 30 years experience, was not promoted but less experienced whites were; 2) in March 2000 Elwood Horsey went to psychologist and diagnosed with occupational related depression; 3) in November 2000 Daniel Adonis wrote letter asking for down grade due to occupational related stress; 4) in January 2001 Shannon was given an adverse action probation extension, filed grievance; 5) in February 2001 Adonis reported being called a 'token nigger' by subordinates; 6) March 2001 Shannon lost grievance; 7) April 2001 Felix Dean was called 'Dean boy' and filed and lost grievance for that and other disparate treatment; 8) in April 2002 Frank Johnson, a supervisor with 30 years experience was demoted to counselor; 9) October 2002 Weldon Saafir was alleged to be a pervert on email going out to all RSA staff; 10) October 2002 Shannon was demoted; 11) December 2002 Felix Dean complained for being re-fingerprinted.

With regard to district court's granting summary judgment in favor of Shannon's employer, Shannon argues that the district court and court of appeals erred in granting summary judgment in favor of employer. Shannon's testimony and the willing testimony of the majority of

African-American male employees go the pervasiveness of the conduct at issue.

Shannon encourages the U.S. Supreme Court when ruling on the acceptance of Shannon's writ, to consider all evidence in light of its relevance to whether the defendant's conduct may be considered severe and pervasive. Shannon's case is extraordinary and a jury trial should be the fact finder.

05-564 SEP 10 2005

OFFICE OF THE CLERK

In The

*Supreme Court of the United States*

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DERMAN SHANNON

Petitioner,

v.

STATE OF ARIZONA REHABILITATION  
SERVICES ADMINISTRATION  
Respondent.

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**SUPPLEMENTAL  
APPENDIX**

---

DERMAN SHANNON \*  
25514 AUTUMNWIND CT.  
KATY, TEXAS 77494

\* Plaintiff Pro se (281) 395-8190

In The  
*Supreme Court of the United States*

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DERMAN SHANNON  
Petitioner,

V.

STATE OF ARIZONA REHABILITATION  
SERVICES ADMINISTRATION  
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**SUPPLEMENTAL  
APPENDIX**

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DERMAN SHANNON \*  
25514 AUTUMNWIND CT.  
KATY, TEXAS 77494

\* Plaintiff Pro se (281) 395-8190

1b

Derman Shannon  
25514 Autumnwind Ct.  
Katy, Texas 77494

October \_\_\_\_\_, 2005

Supreme Court of the United States  
Office of the Clerk  
Washington, DC 20543-0001

RE: Shannon v. Arizona Rehabilitation Services  
Administration

The following documents are forwarded as Supplemental  
Appendix as requested by September 22, 2005  
correspondence from Clerk of Supreme Court with two  
exceptions (\*):

1. **Memorandum** opinion of the Ninth Circuit Court of Appeals filed June 22, 2005
2. **Minute Entry** filed April 27, 2004 is not available in the District Court and the Court of Appeals do not photo copy and send records out of State (\*)
3. **Order** granting summary judgment filed June 30, 2004
4. **Judgment** granting motion for summary judgment, also filed June 30, 2004
5. **Joint Proposed Case Management Plan** filed April 9, 2003 (\*)

**UNITED STATES COURT OF APPEAL  
FOR THE NINTH CIRCUIT**

DERMAN SHANNON,	) No. 04-16513
	)
Plaintiff – Appellant,	) D.C.No.CV-02-02585-EHC
	)
v.	) <b>MEMORANDUM*</b>
	)
ARIZONA DIRECTOR	)
ECONOMIC SECURITY,	)
DEPARTMENT OF; ET AL.,	)
	)
Defendants – Appellees.	)
	)

Appeal from the United States District Court  
- for the District of Arizona  
Earl H. Carroll, District Judge, Presiding

Submitted June 14, 2005\*\*

Before: KLEINFELD, TASHIMA, and THOMAS, Circuit  
Judges.

Derman Shannon appeals pro se the district court's  
summary judgment in favor of his employer, the Arizona  
Department of Economic Security Vocational

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\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

\*\* The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2)

Rehabilitation Services Administration ("DES"), in his Title VII action alleging racial discrimination and a hostile workplace. We have jurisdiction pursuant to 28 U.S.C. Sec. 1291. We review de novo, *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9<sup>th</sup> Cir. 2001) (en banc), and we affirm.

The district court properly granted summary judgment on Shannon's race discrimination claims concerning a 1999 remark made by a supervisor and a December, 2000 decision to extend Shannon's probationary period, because Shannon failed to first raise these claims with the EEOC. See 42 U.S.C. Sec 2000e-16©; *Sommatino v. United States*, 255 F.3d 704, 708 (9<sup>th</sup> Cir. 2001); *Brown v. Puget Sound Elec. Apprenticeship & Training Trust*, 732

F.2d 726, 730 (9<sup>th</sup> Cir. 1984) (requiring separate EEOC complaints where claims are not so closely related that agency action would be redundant).

The district court properly granted summary judgment on Shannon's claims regarding his reduction in grade without a pay decrease in 2002. Shannon failed to raise a genuine issue of material fact as to whether his employer took this disciplinary measure due to a discriminatory motive rather than due to Shannon's misrepresentation on his job application of the circumstances surrounding his arrest for driving a car containing 200 pounds of marijuana. See *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 658-59 (9<sup>th</sup> Cir. 2002).

Shannon's remaining contentions lack merit.

Shannon's motion to file an addendum in support of his brief is granted. The clerk shall file the addendum received November 16, 2004.

**AFFIRMED**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Derman Shannon,	) No. CIV 02-2585-PHX-EHC
	)
Plaintiff,	) <b>ORDER</b>
	)
Vs.	)
	)
Arizona Department	)
of Economic Security	)
Vocational Rehabilitation	)
Services Administration,	)
	)
Defendant.	)
	)

Pending before the Court is Defendant's Motion for Summary Judgment. [Dkt. 40-1]. Plaintiff filed a Response [Dkt. 51] and Defendant filed a Reply [Dkt. 46]. The matter is now fully briefed.

**I. Background**

**A. Complaint**

1

Plaintiff Derman Shannon ("Shannon") filed a Complaint on December 23, 2002. Plaintiff alleges, *inter*

*alia:*

[T]hat on or about April of 1999, an acting supervisor informed the Plaintiff that another supervisor had informed her that the Plaintiff was, allegedly, self-describing himself as a “former pimp”, which would be an anathema to any African-American professional. The Plaintiff immediately reported this conversation to the supposedly outspoken supervisor, yet no subsequent investigation or resolution ever occurred concerning the matter.

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1

Shannon is a pro se litigant who earned a Master's degree in 1990. [Dkt. 52, Par. 4].

The Plaintiff believes a hostile work environment developed from this situation.

The Plaintiff also alleges that, during his employment [as an Acting Unit Supervisor], although his own supervisory statistical accomplishment pertaining to successful rehabilitations completed easily superceded the office statistical goals, the Defendants' ongoing employment practices concerning African-American supervisors continues to cause a disparate impact on the basis of race that is not consistent with any business necessity, which is a clear violation of Title 42 United States Code Section 2000e-2(k)(1).

The Plaintiff also alleges that, on October 17, 2002, he suffered a retaliatory demotion after the Defendant discovered that the Plaintiff had performed the protected act of filing a complaint with the EEOC, on September 11, 2002, after a demotion had been threatened by the Defendant based upon pretext.

[Dkt. 1].

Shannon further alleges that he "was subjected to a hostile work environment being developed against him due to unresolved slanderous false innuendoes being cast about concerning his character in the workplace by supervisory personnel." [Dkt. 1]. Shannon believes that his success as an Acting Unit Supervisor resulted in his promotion to Unit Supervisor in July 2000. [Dkt. 1].

In January 2001, Arizona Department of Economic Security Vocational Rehabilitation Services Administration ("DES") extended Shannon's probationary period by ninety days. [Dkt. 1]. Shannon alleges that his probation was "improperly extended by a ruse of pretext involving post-dated communications which the Plaintiff had never received prior to their presentation." [Dkt. 1]. DES asserts that the probationary period was extended because DES discovered that Plaintiff had falsified his 1998 employment application with respect to the details of his prior felony charge. [Dkt. 1].

Plaintiff concludes his Complaint by alleging:

It is the opinion of the Plaintiff pro se here that the Defendants have wantonly and illegally conspired to create for, and place the Plaintiff in, a hostile work environment which would stung and thereby torment his aspirations for helping disabled applicants coming before him for services, with a total disregard to the impact such a course of action would have upon the Plaintiff and his family.

[Dkt. 1].

Shannon alleges a hostile work environment and racial discrimination by DES in violation of Title VII of the Civil Rights Act of 1964 and "pendant violations of Arizona State law." [Dkt. 1]. Shannon requests ten million dollars (\$10,000,000.00) in compensatory damages for racial discrimination, retaliation, and negligent and intentional<sup>2</sup> infliction of emotional distress. [Dkt. 1]. Further, Shannon asks for fifteen million dollars (\$15,000,000.00) in punitive damages and a permanent injunction.

**B. Defendant's Motion for Summary Judgment** [Dkt. 40]

DES moved for summary judgment [Dkt. 40] and averred the following alleged undisputed facts:

Shannon, an African-American, applied for employment with DES on October 2, 1996. [Dkt. 41, p.1]. In the application, Shannon disclosed that "I unknowingly was driving a cat that contained marijuana inside - 1994 -

Missouri; I signed a plea." [Dkt. 41, p.1]. Shannon was hired as a Public Assistance Eligibility Investigator I. [Dkt. 41, p.1]. Plaintiff subsequently applied, and was promoted, for various positions within DES, and he disclosed his prior felony conviction using similar language. [Dkt. 41, p.2].

In 1998, Shannon was promoted to Rehabilitation Services Specialist III in the Rehabilitation Services Administration of DES. [Dkt. 41, p.2].

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2

Shannon asserts that his emotional distress was "so severe that Plaintiff began isolating from his family and became immediately depressed." [Dkt. 52, Par 6]. Further, Shannon alleges that he "fought against thoughts of harming those who maliciously wronged him fraudulently, and through prayer was directed to do the right thing and go through the Grievance Process." [Dkt. 52, Par. 6].

3

Similar explanations included (1) "marijuana was in my possession, unknowingly (1994) Missouri conviction to be overturned 7/98;" (2) "1994, marijuana unknowingly in my possession. I was innocent;" and (3) "1994 marijuana was in my possession unknowingly (Missouri) not on probation." [Dkt. 41, p.2] (emphasis in original).